

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

75-7504

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7504

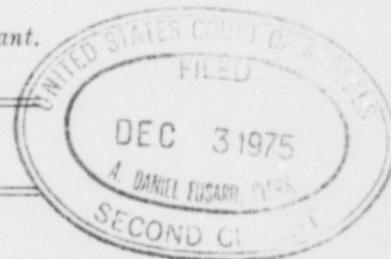
LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD,
ARTHUR SOHNEN and JOHN HAYES, each of them individually
and on behalf of all other members of INTERNATIONAL
ORGANIZATION OF MASTERS, MATES AND PILOTS,
AFL-CIO, similarly situated,

Plaintiffs-Appellees,
against

THOMAS F. O'CALLAGHAN, as President, or CHARLES M.
CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL,
as Vice President, of INTERNATIONAL ORGANIZATION
OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendant-Appellant.

BRIEF OF PLAINTIFFS-APPELLEES



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STATEMENT OF THE CASE

The issue is whether such distribution was in
fact made of a newspaper published by plaintiffs' local union,
containing views opposed to the proposed "new constitution,"
as to overcome the effect of defendant's refusal to allow
plaintiffs an opportunity to send out to members, via the
International union's mailing list, a letter expressing their
views and the views of their local on the issues involved

in the referendum.

The Court below, after full and long consideration of the evidence before it and the arguments of counsel, found as a fact that there was not such distribution of the local union newspaper. (J.A. 118a). It is that factual finding which defendant International challenges on this appeal.

This Court, in its prior decision, Sheldon v. O'Callaghan, 497 F.2d 1276 (1974), cert. den. 419 U.S. 1090 (1974), found that defendant's refusal of plaintiffs' request was unreasonable and, under the circumstances, infringed members' Title I rights. The Court remanded in order to enable defendant International to present its case: specifically, its showing that the local union newspaper was in fact distributed. The Court below found that defendant failed to make the required showing and hence granted judgment for plaintiffs.

1. The Request which Defendant Rejected.

Plaintiffs' request was for distribution of their literature, at their own expense, to members at the latters' home addresses (J.A. 141a, 144a, 147a, 148a). The method requested was, alternatively, publication in the International's newspaper (which would be mailed to all members

at their home addresses) or the turning of the mailing list over to a private mailing service (which was the method traditionally employed by the International in connection with elections of officers; cf. 29 USC 481(c)). But the point of either was that the mailing should go to members' home addresses.

This point is stressed, to emphasize what it is plaintiffs did not request. They did not request the privilege of sending bundles of their literature to other local unions, with the request that the same be distributed to members. They already had this privilege, for whatever it was worth; that it wasn't worth much is obvious from the fact that their own local, Local 88, was the only one whose officers shared their views in opposition to the proposed new constitution (J.A. 40a). Similarly, plaintiffs did not request the privilege of sending literature to the vessels aboard which some were employed; they already had this privilege, for whatever it was worth. (Again, it was not worth much, since any such mailing, which had to go via the company's offices and then by surface mail to a port that the mail was likely to reach before the vessel addressed would, would probably not reach its addressees until the referendum was over -- or until it was too late for the members addressed to vote, or to change their votes.)

It will be noted that defendant International's principal reliance on this appeal is the argument that plaintiffs were, indirectly, given what they did not request: namely, distribution of opposition views, as expressed in Local 88's newspaper, by surface mail to vessels and in bundles to other local unions. It is therefore emphasized that plaintiffs did not request such procedures, that such procedures were probably worthless, and that they had always been available to plaintiffs anyway. The request which defendant rejected was the one that plaintiffs actually did make: namely, for an opportunity to mail their views to members' home addresses.

2. The Members to be Reached.

The referendum was conducted International-wide. The entire membership of the International was thus called upon to vote. That membership totalled about 9,800 (J.A. 41a). It included "inland" members (who work on the rivers, the lakes, and in shore jobs) (52a), pilots who work in diverse places, including the Canal Zone (53a), and it included the numerous "offshore" locals located in the various ports of the United States (J.A. 59a).

Of these various locals, New York's Local 88 had 2300 members (J.A. 41a) and the West Coast Local 90 had slightly less than 2000 (J.A. 60a, 81a). Local 88 strongly opposed the new constitution and there was considerable opposi-

tion among the membership of Local 90 (J.A. 79a). But together, the total membership of these two local unions was substantially less than one-half the total membership of the International. The principal persons whom plaintiffs had to reach, in order to effectively disseminate their oppositional views, were the members of other local unions: the "offshore" members of the Boston, Providence, Baltimore, Norfolk, Savannah, Tampa, Jacksonville, Mobile, New Orleans, Galveston, Houston and other locals; the "inland" locals; and the pilots, who were spread out in such places as the Canal Zone, the Mississippi River and the Columbia River. The only effective way of reaching them was a mailing to their home addresses, by means of the International's mailing list.

3. The Distribution of the Local Newspapers.

The evidence presented by the defendant in the Court below was that the newspapers of the two local unions in which oppositional sentiment was already strongest -- New York's Local 88 and the West Coast Local 90 -- contained some material in opposition to the proposed new constitution. In the case of Local 88's newspaper, this was contained in news articles in the January-February 1970 issue which appeared in March 1970 (to a much lesser extent in the March-April issue which appeared in May 1970); in the case of Local 90's, it was contained in letters to the editor, printed in small type on the inside pages.

Treating this material as expressions of plaintiffs' oppositional views, we then must inquire as to the extent to which the newspapers were distributed.

In Local 90's case, we need not tarry long. The total press run was only 3000 (83a-84a); after mailings to the Local 90 membership and complimentary distribution to management, steamship companies, libraries, other maritime units, etc., few copies could have been left for distribution to members of locals other than Local 90 (71a).

Local 88's newspaper presents a tougher challenge. Local 88 is, after all, plaintiffs' own local; the officers as well as the bulk of the membership shared plaintiffs' opposition to the "new constitution"; and Local 88's newspaper set forth oppositional views in straightforward stories, at least in the January-February 1970 issue. Moreover, Joseph Gaier, Local 88's ex-president, testified (for defendant) that, based upon his recollection of the bills he paid, some 14,000 copies of each issue of Local 88's newspaper were printed (J.A. 41a). Without questioning Gaier's credibility, there might be some question as to the figure: plaintiff Sheldon, who served as President of Local 88 immediately before Gaier (and as Secretary-Treasurer immediately before that) estimated the press run of Local 88's paper as "maybe twice as many as required for the membership of Local 88" (or about 4500) (35a). The bills that

Gaier based his recollection upon were not produced and it is apparent that he had not looked at them recently because he could not remember who the printer was (J.A. 45a). And neither the printer nor anyone else with actual knowledge of how many copies were printed was produced as a witness.

Gaier testified that it was his understanding that the printer, as a routine matter, mailed copies of Local 88's newspaper to all members of Local 88 and to whatever other persons had registered on Local 88's shipping list (42a, 46a), and that in addition the printer mailed bundles of copies to vessels at sea (42a-43a), to other local unions, and to United Seamen's Service Clubs (45a). He had not actually spoken to the printer about that since 1960, at which time Gaier had been a member of the editorial board (63a), and he had not given instructions to the printer since he became president of Local 88 in 1965 (J.A. 64a). Obviously, his understanding is less than certain. The defendant did not call any witness who could support Gaier's understanding.

Assuming Gaier's understanding to be correct, however, we are left with the inference that copies of Local 88's newspaper were mailed to members of Local 88 at their home addresses and to an undisclosed number of other persons who had registered on Local 88's shipping list. These people

were already among the converted, so far as plaintiffs' views were concerned, since Local 88's membership was overwhelmingly opposed to the "new constitution." What about the unconverted? Gaier leaves us with, at best, the (uncorroborated) inference that bundles of copies of Local 88's newspaper were mailed to (i) vessels at sea, (ii) other local unions, and (iii) United Seamens' Service Clubs.

As to the Seamens' Clubs we are left totally in the dark: we don't know where they were, how many there were, or what seamen, if any, frequented them. Nor do we know how many copies were sent to them. As to the other local unions, we can only infer that whatever bundles were sent to them were, if received at all, "deep-sixed." As the Court below noted, the officials of those other locals were "not motivated to distribute them among union members" (J.A. 118a). The officials of all locals other than Local 88 favored the "new constitution" and hence were unsympathetic to the message expressed by Local 88's newspaper. Moreover, Local 88's purpose in sending out its newspaper far and wide was to raid and "solicit" members of other locals to leave those locals and join Local 88 instead (J.A. 46a-47a), a purpose that could not have commended itself to the officials of those other locals. No witness was called to testify as to what happened to those bundles of copies and the only witness called who could have testified (Tuttle of Local 90; see J.A. 67a-69a) was pointedly not asked anything of this kind.

In the absence of any evidence that the bundle mailings to other local unions and/or to the United Seamen's Service Clubs (whatever and wherever these are) were actually distributed to somebody, it must be presumed that these bundle mailings did not result in any dissemination of plaintiffs' views -- or of oppositional views generally -- to anybody at all. And much the same presumption remains as to the mailings to vessels at sea, which Gaier believed (on the basis of no knowledge whatever) to have taken place.

If such mailings actually did occur, and if by one tortuous method or another the copies of the newspapers actually did arrive aboard the vessels and were distributed to members of the International employed thereon, then perhaps some 2000 or so (we are given no precise figures) members may ultimately have come into contact with Local 88's newspaper as a result. But when? How soon? The January-February issue of Local 88's newspaper did not appear until mid-March 1970, and appeared after the International's own newspaper for March had already appeared (J.A. 86a, 88a). If mailed first to the companies' offices, then sent by surface mail to ports which it would reach before the vessel addressed was scheduled to reach them, then it could not have been received by most vessels until late May 1975 -- or too late to affect the votes of the members aboard such vessels in the referendum (and too late for the members, if persuaded by the

views expressed in it, to obtain and cast duplicate ballots).

Defendant failed to produce any witness to testify as to receipt aboard any vessel of either Local 88's newspaper or of Local 90's newspaper. Defendant's argument, therefore, so far as based upon mailings to vessels, relied upon Gaier's understanding that the printer, at some time or another, caused bundles to be mailed to vessels -- without any indication, even to Gaier's understanding, as to when or whether those bundles were ever received. Appellees submit that it would be inappropriate to infer from this alone that the newspapers actually were received aboard the vessels in time to advise members employed thereon, before they voted, as to the views of opponents of the "new constitution."

The only witnesses who did testify as to receipt or non-receipt of the newspapers aboard vessels were plaintiffs' witnesses, Soto and Nereaux. Soto worked as a "night mate" or Port Relief Officer in the Port of New York (Trans. p. 87). In such capacity he went aboard vessels and, as a rule, would see copies there (without knowing how they had got there). But he saw very few, unusually few, copies of the January-February 1970 issue of Local 88's newspaper (Trans. p. 88). Nereaux, during the period in question, was sailing on short, 14-day and 16-day trips. It was his belief that the Local 88 newspaper was not mailed to vessels at all during this period (JAA, 95) and that

the only way that any copies got on the ships was when and if the union's patrolmen brought them (J.A. 95a). Occasionally, he said, he would see a copy lying around but only "very rarely" (J.A. 92a, 95a). He does not recall coming across any copy at all of the January-February 1970 issue (J.A. 93a). And Nereaux, who was politically active as a member of Local 88 and prospective candidate for office (J.A. 94a), would likely have recalled seeing that issue if he had come across it.

The Court, after hearing the testimony, and after mature consideration of the evidence, concluded as to the witness Gaier (J.A. 118a),

"... I thought the witness was credible, but the substance of his testimony I really don't think established that the union membership got the message through the newspaper he distributed."

As to the bundle mailings, the Court found that (J.A. 118a)

"At best these papers were sent to people who, if they wanted to, could have contributed among union members but quite likely were not motivated to distribute them among union members."

POINT I.

PLAINTIFFS WERE DENIED AN OPPORTUNITY TO HAVE THEIR VIEWS DISSEMINATED TO THE MEMBERSHIP AS A WHOLE

The officers of a labor organization may not lawfully interfere with the rights of members to communicate their views to other members; Sheldon v. O'Callaghan, 497 F.2d at 1282, supra. As District Judge Walinski has recently held, in Blanchard v. Johnson, 388 F. Supp. 208, at 216 (ND Ohio 1975),

"Since the concept of majority rule is at the center of federal labor policy, Sheldon v. O'Callaghan, 497 F.2d 1276, 1282 (2nd Cir. 1974), it is imperative that the lines of communication among the membership be as unfettered as reason can make them. Union officials bear a heavy burden of justification for any acts which unnecessarily restrain the ability of members to discuss matters on which they are to vote."

And cf. Cefalo v. Moffett, 333 F. Suppl. 1283 (D.D.C. 1971) and Ibid 79LRRM 2740, 2741 (n/o/r) (1972).

This Court has already ruled that, under the circumstances here presented, the rights of members of defendant International were infringed by the refusal of the International's officers to allow plaintiffs to disseminate their views to the membership as a whole by means of the International's mailing list. The issue that remains, and for which the case was remanded,

is whether, despite such refusal, plaintiffs' views and those of their local, opposing the proposed "new constitution," were in fact disseminated to the membership to substantially the same extent that they would have been disseminated had plaintiffs' been allowed use of the mailing list. The clear answer is "No." As Judge Knapp found, after hearing all the evidence and considering the arguments of counsel, it is not established "that the union membership got the message through the newspaper that Local 88 distributed." (J.A. 118a).

It is not reasonably possible to challenge Judge Knapp's finding. All that defendant did establish was that some oppositional arguments were contained in the newspapers published by Locals 88 and 90; that each of those two locals mailed copies of its newspaper to its own members; that Local 88 in addition mailed copies to an unknown number of persons, members of other locals, who were registered on its shipping list; and that according to the understanding and belief of Local 88's president, bundles of copies were also mailed to other local unions, to some Seamen's clubs, and to vessels at sea -- although it is not apparent that such bundle mailings resulted in distribution to any members, or to more than a very few members, and reason would suggest that there was not substantial distribution by this means.

In short, the most that can be inferred from the

evidence in the record is that at most half, and very likely less than half, of the membership of the International received or otherwise came into contact with either the Local 88 newspaper or the Local 90 newspaper -- and the half of the membership that did receive or come into contact with one or the other of those local newspapers was the very half which the plaintiffs, as members of Local 88 (and as a committee elected by the membership of Local 88) were already able to reach with their message.

Plaintiffs, by their own devices, were able to reach most of the membership of Local 88, and possibly of Local 90. It may be presumed that they were also able to reach those other persons who shipped out of the Port of New York. But they were not able to reach the other half of the membership of the International: the members of the various Pilots' locals, the members of the various Inland locals, and the members of the "offshore" locals in such other ports as Boston, Providence, Philadelphia, Baltimore, Norfolk, Savannah, Tampa, Jacksonville, Mobile, New Orleans, Port Arthur, Galveston and Houston. (See: J.A. 52a, 55a, 58a). In order to reach the members of these locals -- other than the few who came to New York to ship out of Local 88's hiring hall -- the plaintiffs needed access to the International's mailing list, which is precisely what was wrongfully denied them. And since neither the Local 88 newspaper nor the Local 90 newspaper (nor both of them, taken ~~aggregatively~~)

reached any substantial number of these members, the fact that oppositional views were published in those local newspapers did not and could not rectify or make up for the wrongful and unlawful refusal of the International's officers to enable plaintiffs, through use of the International's mailing list, to communicate with those members at their home addresses.

Would it have made a difference if oppositional views had been communicated to this "other half" (or more than half) of the International's membership? It must be concluded that it would. For the actual vote on the proposed "new constitution" was 2,781 for and 2,602 against, or a margin of only 179, while the vote on the Offshore Division's bylaws, taken on the same ballot, was 2,206 for and 2,113 against, for a margin of only 93 (J.A. 9a). It surely is not improbable that if the plaintiffs and/or their local union had been given an opportunity to communicate with the 4,000 to 5,000 members who comprised the "other half" of the International's membership, the outcome of the referendum would have been different.

POINT II.

THE NEW CONSTITUTION HAS
NOT BEEN RATIFIED EITHER
DE FACTO OR NUNC PRO TUNC.

As a fall-back position, defendant International argues that events which have taken place since 1970 constitute a nunc pro tunc ratification of the "new constitution." It is important to distinguish this from other arguments that might, under different circumstances, be made: defendant does not argue laches -- nor could it, since plaintiffs brought suit almost immediately (before the referendum was even completed) and promptly sought relief. Nor does it argue that there was a second ratification vote, for in fact there has not been one.

Instead, the International combines two other arguments into its Point II. One is that the district court should not "unscramble" eggs that have been "scrambled"; this argument, if it has any weight at all, goes to the relief actually granted and is thus better directed to the district court's discretion. As the record indicates, the district court has in fact, in deciding upon the appropriate relief, given serious consideration to this problem (J.A. 129a-140a) and come up with a solution sympathetic to defendant's position. The other argu-

ment is that, in the past five years, the new constitution has been amended three times and that at least one of these amendments attempted to respond to membership criticism of the new constitution. That argument is effectively and sufficiently answered by the Court's comment (J.A. 135a) that "... I can't assume they liked what they had to amend just because they amended it."

In short, neither of defendant-appellant's combined arguments has weight, and combining them into one does not lend them weight.

CONCLUSION

For all of these reasons, the decision and judgment of the District Court should be affirmed.

Respectfully submitted,

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New York, N.Y., 10013

Dated: New York, New York
December 8, 1975



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FOR THE SECOND CIRCUIT
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**AFFIDAVIT
OF SERVICE**

Defendant-Appellant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York
That on December 3, 1975 , he served 2 copies of Brief of Plaintiffs-Appellees
on

MARVIN SCHWARTZ, ESQ.,
Attorney for Defendant-Appellant,
243 Waverly Place,
New York, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

...Nathan Chambers...

Sworn to before me this
3rd day of December , 1975

John V. DiSposito
JOHN V. DiSPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977